IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

CRL.A.No. 1496 of 2003()

SC.296/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD
CP.191/1999 of JUDL. MAGISTRATE OF FIRST CLASS, KASARAGOD

.....

APPELLANT: ACCUSED

A.K.JANARDHANAN S/O. RAGHAVAN,
ACHIBHAGILU HOUSE, BANDIYOD, MANGALPADY VILLAGE

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE
---

1. THE SUB INSPECTOR OF POLICE,
KUMBLA POLICE STATION.

2. STATE OF KERALA REP.BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. KPUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL. M.A. NO.9005 OF 2003 IN CRL. APPEAL NO. 1496 OF 2003.

DISMISSED

15.10.2007 Sd/- (K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1496 OF 2003

Dated this the 15th day of October, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.296 of 2000 on the file of the Additional Sessions Court (Ad hoc-I), Kasaragod. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act. By the impugned judgment, the trial court convicted the appellant under Section 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months.

2. The prosecution case against the appellant - accused was that he was found in possession of 140 bottles each containing 180 ml. of Indian made foreign liquor (Boss Whisky) on 16.2.1999 at 4.35 p.m. near the railway line at Bandiyode in Mangalpady Village within the limits of Kumbla Police Station without any permit or licence. To prove the case against the appellant - accused, the prosecution examined PWs.1 to 3 and

produced Exts.P1 to P5. No oral or documentary evidence was adduced by the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. Denying the prosecution charge, the accused stated that he was innocent and that the case was foisted against him by the police.

3. The prosecution relied on the evidence of PWs.1 to 3. PW.3 was the Sub Inspector of Kumbla Police Station during the relevant time. He stated before the court that on 16.2.1999 at 4 p.m. while he and other police officials were on law and order duty, he received information that Indian made foreign liquor was being sold in large scale by the accused and that on the basis of the said information, he went to the place of occurrence. He further stated that on seeing the police party, the accused ran away and that three hard board boxes were found hidden in a pit on the southern side of a thatched house which on inspection were found to contain 140 bottles of Boss Whisky of 180 ml. capacity. This witness further stated that he seized the contraband articles on preparing Ext.P2 seizure mahazar in the presence of PWs.1 and 2 and that on further investigation, the accused was arrested from his house. He also stated that the identity of the accused was proved by witnesses and that the contraband articles seized were produced before the court along with two

bottles of samples taken for chemical analysis. He further stated that final charge was filed before the court on the basis of Ext.P5 chemical analysis report. PWs.1 and 2 were examined to prove seizure of the contraband articles. These two witnesses, however, turned hostile to the prosecution. The trial court found that the prosecution succeeded in proving that the appellant was found in possession of 140 bottles of Indian made foreign liquor for the purpose of sale and hence convicted and sentenced him as above.

4. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

5. Learned counsel appearing for the appellant submits that the finding of the trial court that the appellant was found in possession of 140 bottles of Indian made foreign liquor is not based on any acceptable evidence as the only witness who gave evidence in this regard was the Sub Inspector of Police and that his evidence was not supported by any independent evidence. Counsel further submits that even if the evidence of PW.3 is accepted, it is not possible to hold that the appellant committed offence punishable under Section 55(a) of the Abkari Act in the light of the principles laid down by this Court in the decisions reported in

Surendran v. Excise Inspector, 2004(1) K.L.T. 404 and Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631 and that at the maximum the appellant can be punished only under Section 63 of the Abkari Act for violation of the provisions of the Foreign Liquor Rules.

6. The contention of the learned counsel for the appellant that the evidence of PW.3 is not supported by any independent evidence cannot be taken as a ground for disbelieving the prosecution case as there is no rule or law which prohibits the prosecution to prove its case through the evidence of police officers or investigating officers, if their evidence is otherwise free from doubt. If so, the trial court had correctly appreciated the evidence of PW.3 and found that the prosecution succeeded in proving that the appellant - accused was found in possession of 140 bottles of Indian made foreign liquor at the time and place of incident. The prosecution had already examined PWs.1 and 2 as independent witnesses. Though these witnesses turned hostile to the prosecution, they admitted their signature in Ext.P2 seizure mahazar. That shows that the seizure of the contraband articles was in the presence of these two witnesses.

7. Having found that the appellant - accused had in his possession 140 bottles of Indian made foreign liquor, the next question to be

considered is whether the finding of the trial court that the accused committed offence punishable under Section 55(a) of the Abkari Act is justifiable or not. In this context, it is to be noted that in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404 and Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631** it was categorically held by this Court that to attract an offence under Section 55 (a) of the Abkari Act, the prosecution must allege and prove that the contraband articles found in the possession of the accused were in connection with export, import, transport or transit. No evidence has been adduced by PW.3 regarding this aspect except the fact that the labels on the bottles showed "only to be sold in Karnataka". Hence, the finding of the trial court that the appellant - accused committed offence punishable under Section 55(a) of the Abkari Act is not tenable. That being so and having accepted the evidence of PW.3, what would be the offence or violation of the provisions of the Abkari Act for which the appellant can be convicted?

8. The specific allegation against the appellant - accused was that he kept 140 bottles of Indian made foreign liquor without any transit permit or authority under the provisions of the Abkari Act or the rules framed thereunder. The prosecution had also not proved that the accused was

engaged in the sale of contraband article. The evidence adduced by the prosecution would only show that the appellant - accused was in possession of 140 bottles of Indian made foreign liquor. Rule 1A of the Foreign Liquor Rules defines foreign liquor as follows:

> "`Foreign Liquor' in these Rules means and includes all wines, spirits, beer, cider, fenny and other fermented liquors and plain rectified spirit including absolute alcohol intended to be used for the manufacture of liquors meant for human consumption into the State by sea or land or air, whether manufactured in India or outside."

As per Rule 11A of the Foreign Liquor Rules, no quantity of foreign liquor exceeding the quantity as notified by the Government under Sections 10 and 13 of the Abkari Act shall be possessed or stored by any person within the State unless the same is covered by a permit issued by the Officer in charge of the Division concerned. From the above provision and the evidence adduced by the prosecution, it can be seen that the appellant violated Rule 11A of the Foreign Liquor Rules which is punishable under Section 63 of the Abkari Act. Section 63 of the Abkari Act reads as follows:

> "**For offences not otherwise provided for**:-- Whoever is guilty of any act or intentional omission in

> contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such willful act or omission with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both."

9. Considering the facts and circumstances of the case, this Court is of the view that the finding of the trial court that the appellant - accused committed offence punishable under Section 55(a) of the Abkari Act is not sustainable and liable to be set aside. Accordingly, the finding entered by the trial court that the appellant committed offence under Section 55(a) of the Abkari Act is set aside and the appellant is found guilty under Rule 11A of the Foreign Liquor Rules read with Section 63 of the Abkari Act for keeping in possession 140 bottles of Indian made foreign liquor without any transit permit and without paying tax or duty to the Government.

10. The next point to be considered is regarding the sentence to be imposed on the appellant. The incident occurred on 16.2.1999 and the total quantity of Indian made foreign liquor found in the possession of the appellant was 25.2 litres. The prosecution had not adduced any evidence to show that the contraband articles were produced before the court.

Considering all these aspects, this Court is of the view that a fine of Rs.5,000/- and simple imprisonment for three months in default of payment of fine will meet the ends of justice. Accordingly, the appellant - accused is found guilty under Rule 11A of the Foreign Liquor Rules read with Section 63 of the Abkari Act, he is convicted thereunder and sentenced to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for a period of three months. If the appellant has deposited any amount as per the order of this Court, after deducting the fine amount, the balance amount shall be refunded to him. The bail bonds executed by the appellant shall stand cancelled.

The Crl. Appeal is allowed in part.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.

JUDGMENT

OCTOBER, 2007